Allcoast Transfer, Inc. and Ward Moving and Storage, Inc. and Van Drivers, Furniture Warehousemen, Handlers, T.V.-Radio-Appliance-Air Conditioning Servicemen and Piano Movers Local Union No. 392, a/w the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America. Case 8-CA-16740

# 31 August 1984

# **DECISION AND ORDER**

# By Members Zimmerman, Hunter, and Dennis

On 17 April 1984 Administrative Law Judge Walter H. Maloney, Jr. issued the attached decision. The Respondents filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record<sup>1</sup> in light of the exceptions and brief and has decided to affirm the judge's rulings,<sup>2</sup> findings, and conclusions and to adopt the recommended Order as modified.<sup>3</sup>

## **ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents, Allcoast Transfer, Inc. and Ward Moving and Storage, Inc., Cleveland, Ohio, their officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

- 1. Delete paragraphs 1(c) and (d) and 2(b) and reletter the subsequent paragraphs.
- 2. Substitute the attached notice for that of the administrative law judge.

#### APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize and bargain collectively on request with Van Drivers, Furniture Warehousemen Handlers, T.V.-Radio-Appliance-Air Conditioning Servicemen and Piano Movers Local Union No. 392, a/w the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America as the exclusive collective-bargaining representative of all of our driver employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and bargain collectively, on request, with Van Drivers, Furniture Warehousemen Handlers, T.V.-Radio-Appliance-Air Conditioning Servicemen and Piano Movers Local Union No. 392, a/w the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, as the exclusive collective-bargaining representative of all of our driver employees, and WE WILL apply retroactively to the time of its inception the terms and conditions of a contract concluded about 3 June 1983 by the Union and Albert E. Ward, Inc. to all of our drivers.

WE WILL, jointly and severally, make whole all of the driver employees of Ward Moving and Storage, Inc. for any loss of pay or benefits, including wages, overtime, holiday, vacation pay, and profit sharing, which they have lost by virtue of our failure to apply to them the terms and conditions of the union agreement, and WE WILL do so with interest.

WE WILL also, jointly and severally, make whole any jointly administered benefit trust funds for any

<sup>&</sup>lt;sup>1</sup> The Respondents have requested oral argument. The request is denied as the record, exceptions, and brief adequately present the issues and the positions of the parties.

<sup>&</sup>lt;sup>2</sup> In agreeing with his colleagues to adopt the findings of the judge, Member Hunter does not agree with the judge that the statements by the Respondents set forth in fn. 11 of the judge's decision establish a discriminatory motive.

<sup>&</sup>lt;sup>3</sup> We shall delete pars. 1(c) and (d) and 2(b) of the judge's recommended Order as unnecessary and inappropriate, and shall issue a new notice to employees.

contributions covering employees of Ward Moving and Storage, Inc. which were not paid because of our failure to apply to these employees the terms and conditions of the union agreement, together with any delinquency penalties which may be due, and with interest.

# ALLCOAST TRANSFER, INC. AND WARD MOVING AND STORAGE, INC.

#### **DECISION**

#### STATEMENT OF THE CASE

WALTER H. MALONEY JR., Administrative Law Judge. This case came on for hearing before me at Cleveland, Ohio, on an unfair labor practice complaint, 1 issued by the Regional Director for Region 8 of the Board, which alleges that Respondents Allcoast Transfer, Inc., and Ward Moving and Storage, Inc., 2 violated Section 8(a)(1) and (5) of the Act. More particularly, the complaint alleges that the Respondents are alter egos of each other and are a single employer. It further alleges that they have illegally altered the terms and conditions of employment of employees of Ward Moving and Storage, Inc. (Ward Moving) by refusing to apply to those employees the provisions of a collective-bargaining agreement which was then and there in full force and effect between the Union and Allcoast Transfer, Inc. (Allcoast). Respondents deny that they are alter egos, deny that Ward Moving has any obligation to recognize the Union and abide by the terms of the union agreement, and further assert that the application of the alter ego and single employer doctrines to their small businesses is a deprivation of their Federal constitutional right to do business as they please. On these contentions the issues herein were joined.

## FINDINGS OF FACT

#### I. THE UNFAIR LABOR PRACTICES ALLEGED

Albert Ward was an Ohio corporation which was engaged for many years in the moving business in Cleveland, Ohio. It was purchased in 1976 by Robert E. Harris, an attorney, who formerly practiced law in Cleveland, and who is now engaged in the active practice of law in Boca Raton, Florida. Since 1976, Harris has owned at least 90 percent of the stock in Albert Ward and has been its principal officer and operating chief. In June 1979 Albert Ward moved its office and operating terminal to its present location at 23700 Corbin Drive in Warrensville Heights, a suburb of Cleveland. In January 1983, for reasons discussed later, Albert Ward changed its name to Allcoast Transfer, Inc., and received a certificate from the Ohio Secretary of State approving the corporate name change. Other than the change of name, nothing else changed with respect to its structure or operations, and all agree that Allcoast is merely Albert Ward under a different title. It should be noted that for years Albert Ward operated under the trade name of "Ward Moving & Storage" and many of its trucks bore the insignia "Ward Moving & Storage." It solicited business under both of these names. Its principal salesmen were Harris, who acted in this capacity on a part-time or occasional basis, and Lee Shank, a full-time salesman.

For a number of years, Albert Ward, now Allcoast, has maintained a collective-bargaining relationship with the Union covering its drivers. The most recent contract, a 3-year association agreement between the Cuyahoga County Van Operators Association and the Union, was adopted by Albert Ward and signed by Harris in 1982. It expires on June 2, 1985, and contains provisions for annual wage reopeners.

Albert Ward was, and Allcoast now is, a certificated common carrier for general commodities and household goods. It operated, and continues to operate, in interstate commerce on certificate of convenience and necessity issued by the Interstate Commerce Commission. It also operated, and continues to operate, within the State of Ohio on a state certificate issued by the Public Utilities Commission of Ohio, and it did, and still does certain local moving without any express public authorization in portions of the Cleveland area which are exempt from regulation. Most of its business was performed as the Cleveland agent of Atlas Van Lines, Inc. (Atlas), a large national moving company. When hauling goods for Atlas, Albert Ward normally operated on the interstate authority issued to Atlas by the ICC. A number of its trucks bore the insignia "Atlas Van Lines." Its employees were regularly and interchangeably assigned to work performed for Atlas as well as to work performed for a variety of other customers.

On February 11, 1982, the board of directors of Atlas adopted new rules and regulations applicable to all Atlas agents throughout the United States, including but not limited to Albert Ward. According to this new policy, all moving companies who wished to continue as Atlas agents had to surrender their own ICC authority and op-

<sup>1</sup> The principal docket entries in this case are as follows:

Charge filed herein by Van Drivers, Furniture Warehousemen, Handlers, Union No. 392, affiliated with International Brotherhood of Teamsters, against both Respondents on May 16, 1983; amended charge filed by Union against both Respondents on June 29, 1983; complaint issued against both Respondents by the Regional Director on June 30, 1983; answer of Respondents filed July 8, 1983; hearing held before me on March 1, 1984.

<sup>&</sup>lt;sup>2</sup> Respondents admit, and I find, that Allcoast, formerly known as Albert E. Ward, Inc. (Albert Ward), is an Ohio corporation which maintains an office and place of business near Cleveland, Ohio, where it is engaged in the intrastate and interstate transportation of freight. Respondent Ward Moving and Storage, Inc., is and at all times material herein has been an Ohio corporation which maintains an office and place of business near Cleveland, Ohio, where it is engaged in the interstate transportation of freight. In the course and conduct of its business, Respondent Allcoast has derived gross revenues in excess of \$50,000 from the transportation of freight and commodities from the State of Ohio directly to points and places located outside the State of Ohio. Based on a projection of its operations since on or about March 1, 1983, at which time Respondent Ward Moving and Storage, Inc. commenced operations in the State of Ohio, said Respondent will annually derive gross revenues in excess of \$50,000 annually from the transportation of freight and commodities in interstate commerce. Accordingly, both Respondents are employers engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. The Union is a labor organization within the meaning of Sec. 2(5) of the Act.

erate exclusively on the ICC authority issued to Atlas. Harris objected to this new policy and even complained to the ICC about it. His complaints, however, went unheeded and he was faced with the choice of seeing Albert Ward either surrender its ICC certificate or losing Atlas as a source of business.

Late in 1982 or early in 1983, Harris obtained the name change for Albert Ward, noted above, and organized another corporation, Respondent Ward Moving. The new corporation adopted as its formal corporate title the trade name under which Albert Ward (now Allcoast) had been doing business for several years. Harris is the sole shareholder and officer of Respondent Ward Moving. Ward Moving has no operating authority of its own and has become the Cleveland agent of Atlas, inasmuch as Harris decided that Allcoast should retain its ICC authority and surrender the Atlas franchise. It operates either on Atlas' authority or on the authority retained by Allcoast.

Shortly before these events occurred, Harris relocated his home from Cleveland to Boca Raton, Florida, and opened a law office. He transferred the Albert Ward-Allcoast records from the Cleveland terminal on Corbin Drive to Boca Raton and maintains them, along with the Ward Moving records, either in his law office or at his home. Harris operates both companies by remote control from Florida, in addition to practicing law, and admits that he makes all major business decisions for both organizations, including, but not limited to, the establishment and implementation of labor relations policies. Payroll information is transmitted to him by telephone and he signs all paychecks for employees of both organizations on checks which are drawn on a Florida bank. Accounting records are also maintained in Florida. Part of the billing is done in Cleveland and part is done from Boca Raton.

Since the creation of Ward Moving to accommodate the demands of Atlas, Ward Moving has continued to operate from the Corbin Drive terminal, a facility which it rents on a month-to-month basis from Louis Litoff, trustee. Ward Moving sublets portions of this terminal to other companies, including competing moving companies. When Ward Moving was first established in January 1983, Harris moved the Albert Ward-Allcoast operation to a garage which was rented at 7000 Granger Road in Independence, Ohio, another Cleveland suburb located some 6 miles distant from the Corbin Drive terminal. All of the rolling stock of both companies remained titled in the Albert Ward name and much of it was left at Corbin Road for use by the new Ward Moving Corporation.3 A tractor-trailer, a pack van, and one other vehicle were repainted and were relocated at Granger Road but all continued to be maintained by an Allcoast mechanic.4

Albert Ward employees were notified of the changes which were taking place by a letter issued on the letterhead of Ward Moving & Storage. It was dated January 19, 1983, and was signed by Harris. It read:

As you have probably heard by now, Atlas Van Lines, Inc. has issued a new policy to all their agents, wherein agents can only represent Atlas Van Lines, Inc. if they do not have their own operating authority. Since Albert E. Ward, Inc., has 48state operating authority for household goods and general commodities, which is extremely valuable, I have decided to sever relations with Allied Van Lines, Inc.

Since a large part of our business is done on our own authority, and perhaps the most profitable part of our business is done on the same, it is not in our best interests to relinquish this authority. We may, at a later date, represent another van line under the Albert E. Ward, Inc., name that does not have the stringent requirements of Atlas Van Lines, Inc., and I am investigating this matter.

Since we will not need all of the space we are currently occupying, Albert E. Ward, Inc., which is in the process of changing its name to Allcoast Transfer, Inc., is moving out of the Corbin Drive address to 7000 Granger Road, Independence, Ohio. We currently will occupy a few thousand feet but have the capacity of expanding our space needs, as needed.

The date we are planning to be in full operation at our new location is January 31, 1983. All Albert E. Ward, Inc. (Allcoast Transfer, Inc.) employees should report to Gary Kelly, and he will instruct you where and when to report to work at our new location.

When the second corporation was established,<sup>5</sup> certain employees of Albert Ward-Allcoast were given the option of relocating to Granger Road as Allcoast employees and continuing to work under the union agreement, or remaining at Corbin Drive as unrepresented Ward Moving employees doing, in large part, work referred by Atlas. No Atlas work was done by Albert Ward-Allcoast at Granger Road nor could it be done under the new Atlas policy. Four employees moved to the Grange Road location and continued to work for Allcoast. They were Richard Eckhardt, Wallace Lyles,

<sup>&</sup>lt;sup>3</sup> Albert Ward owned six tractors, two straight trucks, nine trailers, and four pack vans. Two of these vehicles had no insignias on the side. The others bore the insignias of Albert E. Ward, Inc., Atlas Van Lines, Inc., or the trade name Ward Moving and Storage Company.

<sup>&</sup>lt;sup>4</sup> The Allcoast equipment was repainted so that it would not have the same colors or logos which are used by Atlas.

<sup>&</sup>lt;sup>5</sup> On March 4, Harris sent a form letter, addressed "Dear Vendor," on

the stationery of Allcoast Transfer, Inc., which read:
Please be advised that Albert E. Ward, Inc., recently changed its name to Allcoast Transfer, Inc. Other than the change in names, all matters with respect to the company remain the same.

Allcoast Transfer, Inc., Inc., has also moved its offices to 700 Granger Road, Cleveland, Ohio 44131.

Please correct your records, and if you have any questions, do not hesitate to contact me.

Another corporation has been formed called Ward Moving & Storage Company, which will continue to be the Atlas Van Lines agent in Cleveland, Ohio. We would appreciate it if you would open up a separate account for Ward Moving and Storage Company, in addition to Allcoast Transfer, Inc. Ward Moving & Storage Company will be located at 23700 Corbin Drive, Cleveland, Ohio 44128.

Tom Cooper Jr., and John Aikens. Two of these individuals have since left the Company. The balance of the employees remained at Corbin Drive. Albert Ward had a small office at Corbin Drive. None of the clerical employees at that office was transferred to Granger Road and the size of the staff at Corbin Drive was reduced, inasmuch as some of their work was transferred to Florida. Ward Moving now has four or five regular drivers, including two former Albert Ward drivers. They wear uniforms which say "Atlas Van Lines," although they are not, in fact, Atlas employees. Some are hourly rated employees and some drive on a percentage basis.

On January 25, 1983, Thomas Cooper, secretary-treasurer of the Union, wrote Harris a letter, which was addressed to him as the president of A. E. Ward Moving & Storage Company:

Recently, Teamsters Local Union No. 392 received a copy of a letter dated January 19, 1983, wherein it appears that you are going to establish a company known as Allcoast Transfer, Inc., as a part of your business enterprise. It is the Local's understanding that this change in you enterprise is a result of a Policy decision made by Atlas Van Lines. Local #392 has also learned that you are going to maintain A. E. Ward Moving and Storage Company as an Atlas Van Lines agent.

So that there is no confusion, it is the position of Local #392 that the work to be done by both A.E. Ward Moving & Storage Co. and Allcoast Transfer, Inc. is bargaining unit work covered by the collective bargaining agreement currently in effect between Local #392 and your enterprise. All wages, hours and other terms and conditions of employment set forth in the current collective bargaining agreement shall be applied to the employees at both Ward's and Allcoast.

Please be advised that Local #392 will take all legal recourse to prevent you from circumventing your contractual obligations.

If you disagree with our analysis, the Local will be willing to review any information you may want to submit.

On February 2, 1983, Harris replied to Cooper on the letterhead of his Florida law office:

This letter will acknowledge receipt of your letter of January 25, 1983, wherein you discuss the collective bargaining agreement currently in effect between Local 392 and Albert E. Ward, Inc.

Please be advised that Albert E. Ward, Inc. has changed its name to Allcoast Transfer, Inc. and intends fully to comply with its collective bargaining agreement with Local 392. It is not my intent to circumvent my contractual obligations.

However, any new corporation I form does not mean that I inherit a 392 Local by virtue of my business interests in a copy that has a union contract.

As Atlas Van Lines has required Albert E. Ward, Inc., to leave its agency network I have formed a new corporation known as Ward Moving & Storage

Company. This new corporation is an Atlas Van Lines agent.

If you have any questions regarding the above, please feel free to contact either me or my labor counsel, Bernard Goldfarb, in Cleveland.

On March 15 Cooper wrote Harris as follows:

Please be advised that Teamsters Local Union No. 392 hereby demands that Ward Moving & Storage Company honor the collective bargaining agreement entered into with Local 392. It is the position of the Local that an employer cannot escape its contractual obligations simply by setting up a new corporation which, in effect, is the alter-ego of the existing corporation that has a collective bargaining arrangement with the Local Union.

Please advise the undersigned within seven (7) days of receipt of this letter as to whether or not Ward Moving & Storage will honor the collective bargaining agreement entered into with Local 392 or wishes to bargain over an appropriate collective bargaining agreement for the group of employees employed by Ward. If the undersigned has no contact from you within (7) days, we will assume that you have refused to recognize Local 392 as the collective bargaining representative for the employees employed by Ward Moving & Storage.

Harris replied to Cooper's March 15 letter on March 21:

This letter will acknowledge receipt of your March 15, 1983 letter regarding Allcoast Transfer, Inc. and Ward Moving & Storage.

Since I am general counsel to both corporations, I want to clarify our position regarding you local. First, Allcoast Transfer, Inc., has a collective bargaining agreement with your Local. It is the intent of Allcoast to honor this contract to its entirety. In no way whatsoever will Allcoast attempt to circumvent its contractual obligations entered into with your Local.

Second, Ward Moving & Storage Company is a completely separate corporation, duly organized under the laws of Ohio. This corporation does not have a collective bargaining contract with your Local or any other Local Labor Unit [sic]. As you know, the employees of this corporation certainly are free to organize, if they choose. However, as you also know, the employees do not want your Union or any other one to represent them at this time.

Please be advised that it will be the intent of Ward Moving & Storage Company to hold your Union liable for any legal defense or other damages sustained by your actions you appear to be contemplating.

On May 16, the Union filed a charge against both corporations.

Since the inception of Ward Moving in January 1983, Gary Kelly has served as its supervisor at the Corbin Road facility. Previously he was the Albert Ward supervisor. Kelly asked Richard Eckhardt to be the supervisor at the new Allcoast facility on Granger Road, but Eckhardt declined because he had been advised by the Union that he could not remain in the Union and become a supervisor. He agreed to become a working foreman and did so, spending about 95% of his time doing bargaining unit work. In this capacity he reported directly to Kelly, although Kelly was on the payroll of Ward Moving, not Allcoast. Eckhardt maintained a daily dispatch book, served as a go-between picking up and delivering papers to and from the Granger Road and Corbin Drive locations, and assigning work to the two or three drivers employed at Granger Road. For the most part, these assignments were preordained, since certain Allcoast drivers regularly took local runs and one driver regularly made over-the-road deliveries. 6

In October 1983, Harris closed the Granger Road garage and moved the Allcoast operation back to Corbin Drive. He had originally hoped to pick up additional business by maintaining a separate location and had in mind a possible affiliation by Allcoast with another national van line such as Allied. Such an affiliation would have required Allcoast to operate from different premises than those which served Atlas. The anticipated business did not materialize, however, at least to the extent that it warranted maintaining a separate facility. Now Ward Moving and Allcoast operate from the same terminal. Kelly supervises both of them and acts as a dispatcher for both operations. Allcoast employees regularly phone Kelly to see if there is work to be done and report for work only if he instructs them to do so. From time to time, Kelly utilizes employees of both companies interchangably, depending upon the work load and the type of run which is being dispatched. Allcoast employees continue to be paid pursuant to the contract while Ward Moving employees are not. Harris admits that Ward Moving employees receive different (and usually lower) rates, which vary depending upon the run which is assigned. Benefits paid to both groups are somewhat different. The fringe-benefit package paid to Allcoast employees is basically the teamster health and welfare program for the Cleveland area, while Ward Moving employees receive different benefits. Allcoast employees receive profit sharing while Ward Moving employees do not.

Throughout this period of transition, Harris, and more especially Shank, have continued to solicit business for both enterprises. In normal practice, whoever secures a job determines at the time of the bid whether the work will be given to Allcoast or to Ward Moving. These determinations are normally governed by the nature of the moving job and its destination. The price is set by these factors and by the costs to be incurred by the company to whom the work is assigned.

## Analysis and Conclusions

A. The Violations of Section 8(a)(1) and (5) of the Act

The criteria for determining whether two companies are a single employer were set forth by the Supreme Court in *Radio Union v. Broadcast Service of Mobile*, 380 U.S. 255 at 256 (1965), as follows:

[In] determining the relevant employer, the Board considers several nominally separate business entities to be a single employer where they comprise an integrated business enterprise. NLRB Twenty-first Ann. Report, 14–15 (1956). The controlling criteria, set out and elaborated in Board decisions, are interrelation of operations, common management, centralized control of labor relations and common ownership.

These four criteria were reiterated by the Supreme Court as the factors determining single employer status in South Prairie Construction Co. v. Operating Engineers Local 627, 423 U.S. 800 (1976). In addition to the single employer doctrine, the Supreme Court has long recognized another Board doctrine imposing liability on one entity for the unfair labor practices of another. Where a new business enterprise is merely the disguised continuance of an older one, the Board, with Supreme Court approval, will find the new entity an alter ego of the earlier one and impose on the new entity the liability or continued responsibility pertaining to the former. Southport Petroleum Co. v. NLRB, 315 U.S. 100 (1942). The question of animus may have a bearing on the finding of alter ego status.8 However, animus or antiunion motivation is not an essential element for such a finding. Crawford Door Sales Co., 226 NLRB 1144 (1976); Nelson Electric Co. v. NLRB, 638 F.2d 965 (6th Cir. 1981). As the Supreme Court put it in Howard Johnson Co. v. Detroit Joint Executive Board, 417 U.S. 249, at 259 (1974):

Such (alter ego) cases involve a mere technical change in the structure of identity of the employing entity, frequently to avoid the effect of the labor laws, without any substantial change in its ownership or management. In these circumstances, the courts have had little difficulty holding that the successor is in reality the same employer and is subject to all the legal and contractual obligations of the predecessor. [Emphasis added.]

<sup>&</sup>lt;sup>6</sup> Eckhardt did not hire, fire, or discipline employees. Whatever assignments were given by him were normally either made by Kelly, in the first instance, or were determined by whether the work in question was local or long-distance hauling. He was paid the contract rate for a rank-and-file employee and spent most of his time working in that capacity. Harris argued that the Granger Road facility basically ran itself and that he himself was Allcoast's supervisor, although Harris was normally more than a thousand miles from the garage and rarely visited it. I conclude that Eckhardt was at all times material herein an employee within the meaning of Sec. 2(3) of the Act.

<sup>&</sup>lt;sup>7</sup> Harris admits that Kelly is a supervisor for Ward Moving but denies that he was or is a supervisor for Allcoast. When asked what Kelly's function was vis-a-vis Allcoast, Harris replied that Kelly was Harris' agent on the premises who was responsible for doing what Harris told him to do. The distinction noted is arcane, and I conclude that Kelly is a supervisor within the meaning of Sec. 2(11) of the Act for both Respondents.

<sup>&</sup>lt;sup>8</sup> See, for example, Naccarato Construction Co., 233 NLRB 1394 (1977); P. H. Hayes, 226 NLRB 230 (1976); DMR Corp., 258 NLRB 1063 (1981).

The Board has recently had occasion to pass on these questions and distinctions and to find alter ego status in a situation having facts far less compelling than those presented in this case. Samuel Kosoff & Sons, 269 NLRB 424 (1984).

Tested by the above-stated criteria, it is clear that Allcoast and Ward Moving are alter egos and merely twin facets of a single business activity best described as Harris enterprises. Harris is practically the sole owner of Allcoast, is in fact the sole owner of Ward Moving, and is also sole officer of both.9 Harris admits that he makes all major business decisions pertaining to each organization and that he establishes and effectuates the labor relations policies of both. Both companies are engaged in the moving business at the same location and utilize the same rolling stock for this purpose. Ward Moving is basically a corporate shell having few assets. It utilizes Allcoast's equipment and the trucking authority belonging either to Allcoast or Ward Moving's principal customer, Atlas. On the other hand, Allcoast, having abandoned the Corbin Drive terminal it had rented for years, soon returned to its old location and found a home as a subtenant of Ward Moving.

Ward Moving was established so it could handle the business provided by Allcoast's prize customer, Atlas. Allcoast's role was to handle the other customers who were formerly serviced on its interstate and intrastate certificates, as well as looking for additional business which requires a certificated carrier. Harris and Shank continue to solicit business for the total enterprise just as they did before the creation of Ward Moving. They decide, as each job is quoted, which company will handle it, formulate their bid accordingly, and shunt the work to Allcoast or to Ward Moving at their discretion. In this manner, Harris maintains a truly "double breasted" operation, 10 a term normally reserved to building and construction entrepreneurs who seek to operate both on a union and a nonunion basis but applicable in this case to a motor carrier.

Not only do Allcoast and Ward Moving use the same equipment in their joint operation, they have the same supervisor and frequently interchange employees. Their principal difference is that one company recognizes the Union and complies with a collective-bargaining agreement while the other does not. Harris insists that Ward Moving was not established to avoid the requirements of the contract but to comply with the arbitrary dictates of a large client who would no longer permit Allcoast (and its predecessor in title) to retain its business without surrendering state and Federal operating authority. Thus, Harris was forced to resort to the subterfuge described in this record in order to remain the Atlas representative in the Cleveland area without abandoning his other customers.<sup>11</sup> While these circumstances may explain the deci-

sion to create Ward Moving as a separate corporation, they do not explain a totally separate and subsequent decision on Harris' part in refusing to apply to Ward Moving employees the terms and conditions of employment which governed their performance of Atlas work prior to the change in corporate structure. As an alter ego of Allcoast and a thinly disguised continuance thereof, Ward Moving was obligated to continue to recognize the Union as the bargaining agent of its employees and to apply to those employees the necessary consequence of such recognition, namely, the agreement which Harris had executed in the summer of 1982 with Local 392. Harris refused to do so and is performing the same work for Atlas and others that he undertook to do at union rates for less than union scale whenever he assigns work to Ward Moving. By these acts both Allcoast and Ward Moving violated Section 8(a)(1) and (5) of the Act.

# B. Respondents' Constitutional Argument

Both at the hearing and in the brief, the Respondents have argued that it would be unconstitutional to apply to it the Board's alter ego and single employer doctrines. Since these doctrines are an integral part of the enforcement of the Act, the Respondents are necessarily arguing that the Act is unconstitutional, at least as applied to them, although they have failed to distinguish their situation from other cases in which the Act has been found to be constitutional. The essence of Harris' argument is that the Act is invalid because it unconstitutionally prevents him from doing what he want to do (Tr. 132, L. 22). I know of no such constitutional right.

The constitutional attack leveled herein on the National Labor Relations Act and on one of the longstanding interpretations thereof<sup>12</sup> comes late in the day. It also comes from a peculiar source, namely, from two common carriers who operate in large part by virtue of authority conferred by a Federal agency. In 1937, the Supreme Court held that the Act was a proper exercise of powers conferred on Congress by the Commerce Clause and one which fell within the limitations of the Due Process Clause of the fifth amendment. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1. Since that time, nearly 270 volumes of Board cases and 30 volumes of court cases (including 200 to 300 Supreme Court cases)

<sup>&</sup>lt;sup>9</sup> The Board has never required identical ownership as a prerequisite for a finding of alter ego status. *Campbell-Harris Electric*, 263 NLRB 1143 (1983); *Crawford Door Sales Co.*, supra.

<sup>10</sup> See P.A. Hayes, supra.

<sup>11</sup> The General Counsel and the Charging Party point out in their briefs that, since a violation of Sec. 8(a)(1) and (3) of the Act was not alleged in the complaint, it is not incumbent on the General Counsel to prove a discriminatory motive. Such evidence can be found in the

record, however, both in Harris' written statement to the Union on February 2 ("any new corporation I form does not mean that I inherit a 392 Local by virtue of my business interests in a copy that has a union contract") and his statements to the Board at the hearing in this case ("what is being said in this case where, you know, I can't deny a lot of the things that I was asked, is that Robert Harris can never, in the jurisdiction of 392 Local, open a corporation in the same line of business in Cleveland, Ohio. That's what the alter ego status is saying in its very narrowest concept, that I could never be in the moving and storage business in Cleveland, Ohio, without applying the collective bargaining contract

<sup>....</sup> JUDGE MALONEY: You can open any business you want. MR. HARRIS: Not without the collective-bargaining agreement rammed down my throat .... JUDGE MALONEY: Well, why do you want to escape it (the alter ego status), just to escape the union? MR. HARRIS: My men don't want. I would be doing a disservice to them. JUDGE MALONEY: And you don't want it. MR. HARRIS: And I don't want it, I'll be honest with you. Who needs it? Who wants it?").

<sup>12</sup> See Southport Petroleum, supra.

have been decided without disturbing this fundamental holding. I decline to disturb it now.

On these findings of fact and on the entire record considered as a whole, I make the following

#### CONCLUSIONS OF LAW

- 1. Respondents Allcoast Transfer, Inc., and Ward Moving and Storage, Inc., and each of them, is now and at all times material herein has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and are alter egos of Albert E. Ward, Inc., and each other.
- 2. Van Drivers, Furniture Warehousemen, Handlers, T.V.-Radio-Appliance-Air Conditioning Servicemen and Piano Movers Local Union No. 392, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America is a labor organization within the meaning of Section 2(5) of the Act.
- 3. All drivers employed by Allcoast Transfer, Inc., and Ward Moving and Storage, Inc., but excluding office clerical employees, professional employees, and supervisors within the meaning of the Act, constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.
- 4. At all times material herein the Union has been the exclusive collective-bargaining representative of all of the employees in the unit found appropriate in Conclusion of Law 3 for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.
- 5. By failing and refusing to recognize and bargain collectively with the Union as the exclusive collective-bargaining representative of the employees employed in the unit described above in Conclusion of Law 3, and by failing and refusing to apply to those employees the terms and conditions of a collective-bargaining agreement concluded by Albert E. Ward, Inc., and the Union about June 3, 1982, the Respondents have violated Section 8(a)(1) and (5) of the Act.
- 6. The aforesaid unfair labor practices have a close, intimate, and adverse effect on the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondents have committed certain unfair labor practices, I will recommend that they be required to cease and desist therefrom and to take other affirmative actions designed to effectuate the purposes and policies of the Act. The recommended Order will require both Respondents to recognize and to bargain collectively in good faith with the Union as the exclusive collective-bargaining representative of their driver employees, and that they be required to apply to all of their driver employees the terms and conditions of the current collective-bargaining agreement which was concluded by Albert E. Ward, Inc., and the Union about June 3, 1983. The recommended Order will require both Respondents, jointly and severally, to make whole the employees of Ward Moving for any loss of wages and benefits which they have suffered by reason of the unfair labor practices found herein, including, but not limited to, holiday and vacation pay, and contributions to health,

welfare, and pension funds required under the terms of the above-recited agreement, together with any interest or penalties due for late payments. FML Supply, 258 NLRB 604 (1981); Samuel Kosoff & Sons, supra. The amounts due for loss of wages, overtime, holiday, vacation pay, profit sharing, and any other amounts of money which can be easily computed will be paid, with interest thereon at the adjusted prime rate used by the Internal Revenue Service for computation of tax payments. Olympic Medical Corp., 250 NLRB 146 (1980); Isis Plumbing Co., 138 NLRB 716 (1962). Inasmuch as a determination of the amounts due to fringe benefit funds, both in contributions and penalties, may be more difficult to compute, I will leave the determination of interest due on such payments to the compliance stage of this proceeding. Merryweather Optical Co., 240 NLRB 1213 (1979). I will also recommend that both respondents be required to post the usual notice advising their employees of their rights and of the results in this case.

On these findings of fact and conclusions of law and on the entire record, I make the following recommended 13

#### **ORDER**

Respondents Allcoast Transfer, Inc., and Ward Moving and Storage, Inc., Cleveland, Ohio, their officers, supervisors, attorneys, successors, and assigns, shall, jointly and severally

- 1. Cease and desist from
- (a) Refusing to recognize and bargain collectively with Van Drivers, Furniture Warehousemen, Handlers, T.V.-Radio-Appliance-Air Conditioning Servicemen and Piano Movers Local Union No. 392, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America as the exclusive collective-bargaining representative of all of the Respondents' drivers, excluding office clerical employees, professional employees, and supervisors as defined in the Act.
- (b) Refusing to apply the terms and conditions of a collective-bargaining agreement concluded by the Union and Albert E. Ward, Inc., about June 3, 1983, to all driver employees of both Respondents.
- (c) Unilaterally and without bargaining in good faith with the Union, withdrawing from, annulling, nullifying, abrogating, or changing said collective agreement or any provision, term, or condition thereof, or attempting to do so, in violation of the Act.
- (d) Through the formation or utilization of a juridical entity, or through shifting unit work to such other entity, or otherwise in violation of the Act, unilaterally evading or attempting to evade or to escape from the obligations of said collective agreement while it is in force and effect.
- (e) By any like or related means interfering with, restraining, or coercing employees in the exercise of rights guaranteed to them by Section 7 of the Act.

<sup>&</sup>lt;sup>13</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

- 2. Take the following affirmative actions designed to effectuate the purposes and policies of the Act.
- (a) Recognize and, on request, bargain collectively with the Union as the exclusive collective-bargaining representative of the Respondents' driver employees.
- (b) Notify the Union, within 10 days, if they recognize the Union as the exclusive collective-bargaining representative of all of the Respondents' employees and that they will apply to all of the Respondents' employees all of the terms and conditions of the collective agreement concluded by Albert E. Ward, Inc., and the Union about June 3, 1983.
- (c) Apply retroactively to the time of its inception to all of the Respondents' driver employees all of the terms, provisions, and conditions of the collective agreement concluded between the Union and Albert E. Ward, Inc., on June 3, 1983.
- (d) Make whole all of the employees of Respondent Ward Moving and Storage, Inc., for any loss of pay or benefits which they have suffered by reason of the unfair labor practices found herein, and make whole all of the jointly administered benefit trust funds established in the contract between the Union and Albert E. Ward, Inc., for any contributions which have not been paid for the benefit of employees of Respondent Ward Moving and Storage, Inc., in the manner described above in the section entitled "Remedy."

- (e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.
- (f) Post at Warrensville Heights, Ohio terminal copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.
- (g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

<sup>14</sup> If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."